In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 537

THE ONEIDA TRIBE OF INDIANS OF WISCONSIN,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

By treaty entered into with the United States dated February 3, 1838, 7 Stat. 566 (Pet. App. 1a), the petitioner Oneida Tribe of Wisconsin ceded to the United States its interest in certain lands purchased for them from the Menominee Tribe, reserving for the use of the Oneida Tribe 65,400 acres of land which it had occupied since the purchase. From the establishment of the reservation until 1889, when it was allotted to individuals, certain members of the Oneida Tribe engaged in improper cutting and selling

of timber from the forested areas on the reservation (Pet. App. 4a, 10a). While the majority of the chiefs and tribal members probably opposed the improper cutting, a significant number of chiefs and a large portion of the tribe encouraged, approved, and condoned the practice (Pet. App. 11a). See *United States* v. *Cook*, 19 Wall. 591, 592. This litigation seeks to recover from the United States the value of the timber on the reservation which was wrongfully cut by members of the Oneida Tribe.

The Court of Claims, after finding that the petitioner had a sufficient interest in the timber to bring the present case, and that the United States had a special responsibility to the Oneidas which included exercising reasonable care to protect the tribe from the actions of its members, carefully reviewed the facts and decided that the federal government had done all that it was required to do in the circumstances to save the timber. The court concluded that the only steps the government could have taken to prevent the defalcation were to send in the army or to enact legislation prohibiting the cutting, sale, or purchase of timber from the reservation. The use of the army, particularly in light of the divisions within the Oneida Tribe itself, was plainly not required. Nor, the Court of Claims found, was congressional action a sufficiently feasible method of dealing with the particular problem to charge the United States with responsibility for loss of the timber because of its failure to legislate. It held (Pet. App. 16a):

> * * * The concerns of Congress are too many-sided to permit its being bound, at peril of the

> defendant's liability, to reach out and deal with particular problems. To these general considerations the present case adds its own special support. The issue of a criminal code for Indian reservations was general, not limited to the Oneidas, and it was controversial; the same was true of the allotment of Indian lands. In the nature of legislative deliberation, enactments of this type might well require a long period of gestation, especially in an era when the minds of the country and of Congress were centered on other pressing themes. * * *

The result reached by the Court of Claims is plainly correct. The issue presented by the case is of no general importance, involving only the application of a standard of fiduciary duty to a unique set of facts. There is thus no occasion for review of the decision below in this Court.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

OCTOBER 1964.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 747844 340